Supreme Court, U.S.
FILED
DEC 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1074

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

FIRST UNION NATIONAL BANK OF FLORIDA
and FIRST UNION CORPORATION OF FLORIDA,

Appellants,

vs.

FLORIDA DEPARTMENT OF REVENUE and
GERALD A. LEWIS, Comptroller of Florida,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT
(AND APPENDIX)

JOSEPH C. JACOBS
THOMAS M. ERVIN, JR.*
STUART E. GOLDBERG
ERVIN, VARN, JACOBS,
ODOM & KITCHEN
POST OFFICE DRAWER 1170
TALLAHASSEE, FL 32302
(904)224-9135

ATTORNEYS FOR APPELLANTS
*COUNSEL OF RECORD

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

The Questions Presented by This Appeal Are:

I. WHETHER PART VII, CH. 220, FLA. STAT., VIOLATES THE FEDERAL PUBLIC DEBT STATUTE, 31 U.S.C. §3124, BY IMPOSING A STATE INCOME TAX ON OBLIGATIONS OF THE UNITED STATES GOVERNMENT.

II. WHETHER PART VII, CH. 220, FLA. STAT., VIOLATES THE FEDERAL PUBLIC DEBT STATUTE, 31 U.S.C. §3124, BY DISCRIMINATING AGAINST INVESTMENT IN OBLIGATIONS OF THE UNITED STATES GOVERNMENT BY TAX CREDITS GIVEN FOR SELECTED FORMS OF IN-STATE INVESTMENT.

PARTIES TO THIS APPEAL

All of the parties appearing in proceedings below, and in this appeal, are listed in the caption. Appellant First Union National Bank of Florida is a national bank. Appellant First Union Corporation of Florida is a corporate bank holding company. Appellant First Union National Bank of Florida is a wholly-owned subsidiary (except for directors' qualifying shares as required by law) of appellant First Union Corporation of Florida. Appellant First Union Corporation of Florida is a wholly-owned subsidiary of First Union Corporation, a North Carolina corporation.

TABLE OF CONTENTS

	PAGE(S)
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
INTRODUCTORY STATEMENT	1
OPINIONS BELOW	2
JURISDICTION	4
STATUTES INVOLVED	6
STATEMENT OF THE CASE	10
SUBSTANTIALITY OF QUESTIONS PRESENTED	19
I. SUBSTANTIALITY OF THE FIRST ISSUE	19
II. SUBSTANTIALITY OF THE SECOND ISSUE	25
CONCLUSION	30
APPENDIX	

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES:

American Bank and Trust Company v. Dallas County, 463 U.S. 855 (1983) 23

Department of Finance v. Forbes, Inc. (U.S.; April 7, 1986; No. 85-1371; cert. den.) 27

Educational Films Corp. v. Ward, 350 U.S. 492 (1931) 20

First National Bank v. Bartow County Board of Tax Assessors, 470 U.S. 583 (1985) 22,23,24

Garfield Trust Co. v. Director, Division of Taxation (U.S.; Nov. 3, 1986; No. 86-261; appeal dismissed for want of a substantial federal question) 22

Memphis Bank & Trust Company v. Garner, 459 U.S. 392 (1983) 26,27

STATE CASES:

Department of Revenue, etc., et al. v. First Union National Bank of Florida, etc., et al., 513 So.2d 114 (Fla. 1987) 2,17

First Union National Bank of Florida, et al. v. Florida Department of Revenue, 502 So.2d 964 (Fla. 1st DCA 1987) 2,14,15

PAGE(S)

STATE CASES CONTINUED:

In the Matter of Forbes, Inc. v. Department of Finance of City of New York, 66 N.Y.2d 243, 487 N.E.2d 251 (Ct. App. 1985) 27

State ex rel. Douglas v. Karnes, 346 N.W.2d 231 (Neb. 1984) 26

FEDERAL STATUTORY PROVISIONS:

U.S.C.

Vol. 28, §1257(2) 5,18

Vol. 31, §3124 1,4,5,6,12,13,14,16,17, 19,20,21,23,24,25,28,30

STATE STATUTORY PROVISIONS:

Fla. Stat.

Ch. 220 10

Part II, Ch. 220 11

Part VII, Ch. 220 1,4,10,11,13,14,17,21

§220.13 7,8

§220.18 8,11,27

§§220.18-220.184 12

§220.63 6,7,10

§220.181 8,9,11

§220.182 9,11

PAGE(S)

STATE STATUTORY PROVISIONS CONTINUED:

§220.183 9,11

§220.184 9,11

Laws of Fla.:

Ch. 71-984 21

Ch. 72-278 21

OTHER AUTHORITIES:

Rules of the Supreme Court of the United States:

Rule 10.3 18

INTRODUCTORY STATEMENT

Appellants, First Union National Bank of Florida and First Union Corporation of Florida, appeal from a final judgment of the Supreme Court of Florida entered September 24, 1987, holding that Part VII, Ch. 220, Fla. Stat., constitutes a "franchise" tax, rather than an income tax, and is nondiscriminatory and, therefore, does not contravene the Federal Public Debt Statute, 31 U.S.C. §3124.

OPINIONS BELOW

The opinion of the Supreme Court of Florida rendered September 24, 1987, is reported as Department of Revenue, etc., et al. v. First Union National Bank of Florida, etc., et al., 513 So.2d 114 (Fla. 1987), and is included in the Appendix submitted herewith (A 1-22). The opinion of the District Court of Appeal, First District of Florida, issued on February 5, 1987, and subsequently reversed by the Supreme Court of Florida, is reported as First Union National Bank of Florida, et al. v. Florida Department of Revenue, 502 So.2d 964 (Fla. 1st DCA 1987), and is also included in the Appendix submitted herewith (A 23-30). The final judgment of the trial court, Circuit Court of the Second Judicial Circuit of Florida, entered December 16, 1985,

is not reported but is included in the Appendix submitted herewith (A 31-40).

JURISDICTION

This is an appeal from a final judgment of the Supreme Court of Florida holding that Part VII, Ch. 220, Fla. Stat., is valid in its imposition of a tax on interest earned from obligations of the United States Government.

Throughout the proceedings in the state courts appellants drew into question and challenged the statute on the grounds of its repugnance to the Federal Public Debt Statute, 31 U.S.C. §3124. Appellants urged below that the statute constituted a mislabeled pure income tax, and that the statute discriminated against obligations of the United States Government, and on both grounds was prohibited by 31 U.S.C. §3124. The trial court declared the Florida statute valid.

After a decision of the intermediate district court of appeal holding the

statute invalid as an income tax proscribed by 31 U.S.C. §3124, the Supreme Court of Florida entered its judgment on September 24, 1987, reversing and holding the statute to be a nondiscriminatory franchise tax authorized by 31 U.S.C. §3124. Notice of Appeal was filed with the Clerk of the Supreme Court of Florida on December 18, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(2), which provides for review of decisions of a state's highest court:

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the . . . laws of the United States, and the decision is in favor of its validity.

STATUTES INVOLVED

The law of the United States involved is 31 U.S.C. §3124, which provides in pertinent part:

> **§ 3124. Exemption from taxation**
>
> (a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except--
>
> (1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and
>
> (2) an estate or inheritance tax.

The challenged state statutes include Section 220.63, Fla. Stat., which states in pertinent part:

> (1) A franchise tax measured by net income is hereby imposed on every bank and savings association for each taxable year commencing on or after January 1, 1973, and for each taxable

year which begins before and ends after January 1, 1973. The franchise tax base of any bank for a taxable year which begins before and ends after January 1, 1973, shall be prorated in the manner prescribed fore the proration of net income under s. 220.12(2).

(2) The tax imposed by this section shall be an amount equal to 5 1/2 percent of the franchise tax base of the bank or savings association for the taxable year. . . .

(3) For purposes of this part, the franchise tax base shall be adjusted federal income, as defined in s. 220.13, apportioned to this state, plus nonbusiness income allocated to this state pursuant to s. 220.16, less the deduction allowed in subsection (5) and less $5,000.

The challenged state statutes also include Section 220.13, Fla. Stat., which provides in pertinent part:

220.13. "Adjusted federal income" defined.--

(1) The term "adjusted federal income" means an amount equal to the taxpayer's taxable income as defined in subsection (2), or such taxable income of more than one taxpayer as

provided in s. 220.131, for the taxable year, adjusted as follows:

(a) Additions.--There shall be added to such taxable income:

* * * *

(2) The amount of interest which is excluded from taxable income under s. 103(a) of the Internal Revenue Code or any other federal law, less the associated expenses disallowed in the computation of taxable income under s. 265(2) of the Internal Revenue Code or any other law. (footnotes omitted)

Also involved are other Florida statutes granting tax credits for certain forms of in-state investment. These statutes include, and state in pertinent part:

220.18 Gasohol Development Tax Incentive Credit.--

(1) There shall be allowed a credit against the tax imposed **by this chapter** . . . (Emphasis supplied.)

220.181 Enterprise Zone Jobs' Credit.--

(1)(a) There shall be allowed a credit against the tax imposed **by this chapter** . . . (Emphasis supplied.)

220.182 Enterprise Zone Property Tax Credit.--

(1)(a) There shall be allowed a credit against the tax imposed **by this chapter** . . . (Emphasis supplied.)

220.183 Community Contribution Tax Credit.--

* * *

(3) Authorization to grant Community Contribution Tax Credit; Limitations on Individual Credits and Program Spending.--

(a) There shall be allowed a credit of fifty percent 50% of a community contribution against any tax due for a taxable year **under this chapter.** (Emphasis supplied.)

220.184 Hazardous Waste Facility Tax Credit.--

(1) A credit against the tax imposed **by this chapter** shall be allowed . . . (Emphasis supplied.)

(2) A credit against the tax imposed **by this chapter** shall be allowed . . . (Emphasis supplied.)

STATEMENT OF THE CASE

On September 14, 1984, appellants filed in state court a Complaint for Declaratory Judgment, Refund of Taxes and Other Relief. The complaint challenged the validity of Part VII, Ch. 220, Fla. Stat., which imposes a tax labeled as the Florida bank "franchise" tax. Appellants are, by said law, subjected to application of the tax on income earned from obligations of the United States Government. Defendants, appellees herein, were the Florida Department of Revenue and Gerald Lewis, Comptroller of Florida.

Ch. 220, Fla. Stat., is the "Florida Income Tax Code". Part VII of Ch. 220, Fla. Stat., is entitled "Special Rules Relating To Taxation of Banks and Savings Associations". Part VII of Ch. 220, Fla. Stat., and specifically §220.63, Fla. Stat., imposes on the income of

banks, including income from obligations of the United States Government, a 5 1/2% tax which is labeled a "franchise" tax, but which is identical to and indistinguishable from the 5 1/2% income tax imposed on all other corporations. The tax on banks under Part VII, Ch. 220, is stated to be "in lieu of" the identical corporate income tax imposed by Part II of Ch. 220, Fla. Stat.

Other sections of Ch. 220, Fla. Stat., grant tax credits against the Florida income tax and the so-called bank "franchise" tax for certain types of in-state investment. See §§220.18, 220.181, 220.182, 220.183 and 220.184, Fla. Stat., quoted above.

Appellants, by their complaint as amended, raised the questions sought to be reviewed in these proceedings. Specifically, appellants challenged the validity of Part VII of Ch. 220, Fla. Stat.,

in its application of tax on interest from obligations of the United States, on the ground that the tax, though labeled a "franchise" tax, was in fact and law an income tax. Appellants asserted that such a state income tax on obligations of the United States Government was prohibited by 31 U.S.C. §3124.

Appellants also challenged the subject tax as being discriminatory (against United States obligations) by operation of tax credits afforded to specified competing forms of in-state investment as set forth in §§220.18 through 220.184, Fla. Stat. Appellants asserted that such state discrimination in favor of a competing or alternative form of in-state investment was prohibited by 31 U.S.C. §3124.

In addition to determination of validity of the tax in question, appellants

sought refund of taxes for the years 1981 through 1984. By agreement of the parties the case was submitted to the trial court for determination of the nature and validity of the statute, a pure legal issue, with determination of amount of tax refund to be determined subsequently if necessary.

The trial court entered its Final Summary Judgment on December 16, 1985 (A 31-40). The trial court considered, spoke to, and determined both issues sought to be reviewed herein. Specifically, the trial court held that the tax imposed by Part VII of Ch. 220, Fla. Stat., was a "franchise" tax rather than an income tax and was, therefore, authorized by 31 U.S.C. §3124. The trial court also held that the challenged law did not discriminate against federal obligations

and, therefore, did not violate 31 U.S.C. §3124.

Appellants then appealed to the District Court of Appeal, First District of Florida, and again raised each of the issues sought to be reviewed in these proceedings. The district court reversed the Final Summary Judgment and held Part VII of Ch. 220, Fla. Stat., invalid in its application to obligations of the United States Government, by decision rendered on February 5, 1987. First Union National Bank of Florida, et al. v. Florida Department of Revenue, et al., 502 So.2d 964 (Fla. 1st DCA 1987) (A 23-30). Specifically, the District Court of Appeal held that the subject tax was a proscribed income tax, stating and reasoning as follows in pertinent part at page 965 (A 28):

> Applying these basic principles to the case before us, we can

find no basis for holding the tax is other than an income tax. On the contrary, the tax imposed by section 220.63 operates in the same manner as the Florida corporate income tax. Both taxes are measured by adjusted federal income for the current tax year; the rates imposed by each are identical, and both taxes are levied upon corporations for the privilege of doing business in the state. The only cognizable difference between the two taxes are the statutory labels, and even that is belied by Section 220.63 being made part of the "Florida Income Tax Code." Finally, we note that the tax imposed by Section 220.68 is expressly in lieu of income tax imposed on other corporations. § 220.65, Fla. Stat.

We hold, therefore, that the tax imposed by Part VII, Chapter 220, Florida Statutes, is an income tax for purposes of Title 31, Section 3124, United States Code, and invalid to the extent it purports to include federal instrumentalities in its measure.

Accordingly, we reverse and remand to the trial court for further proceedings to determine the refund to which appellants are entitled.

(Footnotes omitted)

Because of its disposition of the case on the "income" tax issue, the District Court of Appeal found it unnecessary to address the second issue of discrimination, and expressly so noted in footnote 3 (A 26).

Appellees, the Florida Department of Revenue and the Comptroller of Florida, next appealed the decision of the District Court of Appeal to the Supreme Court of Florida. Appellants herein again raised both issues sought to be reviewed in these proceedings in the proceedings before the Supreme Court of Florida. Specifically, appellants urged by answer brief that the tax was a proscribed state income tax under 31 U.S.C. §3124 and was, therefore, correctly held invalid by the district court. Appellants urged alternatively that the tax discriminated against federal obligations, that the

trial court had erred in holding to the contrary, and that the decision of the district court should be affirmed on this ground as well.

The Supreme Court of Florida addressed both issues sought to be reviewed herein by decision rendered on September 24, 1987. Department of Revenue, etc., et al. v. First Union National Bank of Florida, etc., et al., 513 So.2d 114 (Fla. 1987) (A 1-22). The Supreme Court of Florida reversed the decision of the District Court of Appeal, held that the tax imposed by Part VII, Ch. 220, Fla. Stat., was a nondiscriminatory franchise tax, and held that the tax was not violative of 31 U.S.C. §3124.

Appellants thereafter filed Notice of Appeal to this Court on December 18, 1987 (A 41-43). The Notice of Appeal was filed with the Clerk of the Supreme

Court of Florida as directed by Rule 10.3, Rules of the Supreme Court of the United States. Appellants invoke the appellate jurisdiction of this Court pursuant to 28 U.S.C. §1257(2).

SUBSTANTIALITY OF QUESTIONS PRESENTED

There are two federal questions presented by appellants, both of which are so substantial as to require full review by this Court, with briefs on the merits and oral argument.

I. SUBSTANTIALITY OF THE FIRST ISSUE

Appellants' first issue deals with the nature of the challenged state tax and the state circumvention by mere statutory label of the protections afforded government obligations by 31 U.S.C. §3124. This issue is of great public importance in that if Florida's action is approved, then each and every state or local taxing entity may burden obligations of the United States Government with a corporate income tax by merely labeling that state income tax a "franchise" tax. The impact of such state income taxes on the cost

to the federal government of borrowing funds would be immense and incalculable.

This Court has previously rejected a mere "labeling" analysis in determining the nature of a state tax. In Educational Films Corp. v. Ward, 350 U.S. 492 (1931), dealing with the statutory predecessor to 31 U.S.C. §3124, this Court specifically held that the nature of a tax must be determined by its operation rather than by particular descriptive language or name that may have been given to it. In that case this Court approved a franchise tax measured by income, but in so doing, specifically distinguished the tax there considered from an "income" tax on the basis that the tax was measured by the preceding year's income, and was imposed only if the corporation sought to continue business in the subsequent year. The Florida tax is not of this nature but,

rather, is incurred in the same year as income is earned and is a pure income tax.

The Florida corporate income tax was initially enacted in 1971 by Ch. 71-984, Laws of Florida, and exempted from its operation all income derived from obligations of the United States. In 1972, however, by Ch. 72-278, Laws of Fla., this exemption was repealed and Part VII of Ch. 220, Fla. Stat., was enacted purporting to impose a separate but identical "franchise tax measured by net income" on banks. The state corporate income tax and so-called bank franchise tax are functionally identical and indistinguishable, and are both part of the Florida Income Tax Code. Both apply to and include interest earned on United States Government obligations.

In 1959, The Federal Public Debt Statute, 31 U.S.C. §3124, was amended.

The purpose of this amendment was to abolish the formalistic distinction between taxes "on" income and taxes "measured by" income. First National Bank v. Bartow County Board of Tax Assessors, 470 U.S. 583 (1985). Florida's contention that its tax is a "franchise" tax rather than "income" tax is predicated on that very "measured by" distinction which Congress abolished.

The Florida tax at issue herein, unlike another which was recently presented to this Court, is a "pure" income tax, rather than a multi-basis franchise tax with an income component, as well as other net worth or asset components. See Garfield Trust Co. v. Director, Division of Taxation (U.S.; Nov. 3, 1986; No. 86-261; appeal dismissed for want of a substantial federal question).

The 1959 revision of 31 U.S.C. §3124, which abolished the formalistic distinction between taxes "on" and taxes "measured by" income, did authorize the state imposition of:

> (1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and
>
> (2) an estate or inheritance tax.

It is inconceivable that, by such language, Congress intended to authorize imposition of a pure state income tax, by the mere device of labeling it a "franchise" tax. In 1959 Congress was well-familiar with income taxes as a discrete form of tax, and surely would have enumerated such a tax if intended to be authorized.

Indeed, this Court in American Bank and Trust Company v. Dallas County, 463 U.S. 855 (1983), and again in First Nat. Bank v. Bartow County Board of Tax Assessors

470 U.S. 583 (1985), observed that the very catalyst for the 1959 amendments to 31 U.S.C. §3124 was an Idaho tax "measured by" income, and that one purpose of the amendments was to make clear that income taxes on interest from federal obligations, such as Idaho's, were unlawful.

Thus, the first issue presented for review by appellants presents a substantial federal question meriting plenary review on the merits. If Florida may, by mere statutory label or by resurrection of the "measured by" formalistic distinction, impose a pure income tax on interest from United States Government obligations, then the protections intended by 1959 amendments to 31 U.S.C. §3124 will be thwarted and every state may, and many likely will, impose income taxes on such interest.

II. SUBSTANTIALITY OF THE SECOND ISSUE PRESENTED

The second issue presented by appellants is equally substantial in addressing state tax credits for in-state investment as a form of discrimination against investment in government obligations. This issue and form of discrimination (state tax credits, as opposed to exemptions) has not previously been addressed by this Court.

Congress, by the Federal Public Debt Statute, 31 U.S.C. §3124, has commanded that any "franchise or other nonproperty tax" be "nondiscriminatory." States have typically transgressed this command by laws that exempt from taxation state, local or in-state private obligations, or interest thereon, while extending the tax to obligations of the United States Government.

Most recently, in Memphis Bank & Trust Company v. Garner, 459 U.S. 392 (1983), this Court addressed the issue of discrimination and held that a Tennessee tax which included in the tax base income from federal obligations but excluded income from state and local obligations was invalid. One state supreme court has since referred to this Court's above-cited 1983 decision as "the death knell for state franchise taxes discriminating against federal obligations" and as precluding any de minimus justification regarding degree of impairment of marketability of federal obligations. State ex rel. Douglas v. Karnes, 346 N.W.2d 231, 235 (Neb. 1984).

Another state's highest court has recognized and held that state discrimination in favor of corporate obligations, or in favor of the obligations of other states, will invalidate a local tax under

the restrictions of 31 U.S.C. §3124. In The Matter of Forbes, Inc. v. Department of Finance of City of New York, 66 N.Y.2d 243, 487 N.E.2d 251 (Ct. App. 1985); Department of Finance v. Forbes, Inc. (U.S.; April 7, 1986; No. 85-1371; cert. den.).

Florida's law grants direct tax credits against its income and "franchise" tax to taxpayers who invest in designated types of in-state projects such as hazardous waste facilities, enterprise zone job projects, community development projects, enterprise zone property projects and gasohol development projects. See §§220.18, et. seq., Fla. Stat.

It is clear that under the commands of 31 U.S.C. §3124, as applied by this Court in Memphis Bank & Trust Company v. Garner, 459 U.S. 392 (1983), a tax "exemption" favoring investment in obligations to fund such projects would render the

Florida tax invalid. A direct tax credit favoring such forms of in-state investment, however, also serves to discriminate against United States Government obligations in the competition for finite investment funds, and thereby discriminatorily impairs the marketability of United States Government obligations.

The substantiality of this issue is heightened by the open-end nature of this discriminatory device. If Florida may use this tax credit device to favor in-state investment in the currently enumerated type of projects, to the detriment of obligations of the United States Government, then it may also do so as to a myriad of other types of projects and investments. If Florida may do so, then other states may also do so. The Federal Public Debt Statute, 31 U.S.C. §3124, does not restrict its prohibitions against

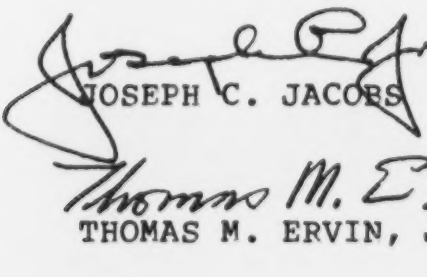
discriminatory taxes to any specified form of discrimination, and should not be interpreted to permit a state tax to discriminate by means of tax credits for forms of in-state investment.

Appellants, therefore, urge that this second issue also presents a substantial federal question deserving plenary consideration, with briefs on the merits and oral argument.

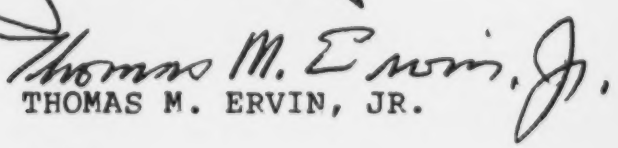
CONCLUSION

For the foregoing reasons the federal questions presented by this appeal are substantial and of great public importance. At issue is significant, prohibited state circumvention of the Federal Public Debt Statute, 31 U.S.C. §3124, and impairment of the borrowing power of the United States Government. It is respectfully urged that probable jurisdiction should be noted and plenary review, with briefs and oral argument, scheduled.

Respectfully submitted,



JOSEPH C. JACOBS



THOMAS M. ERVIN, JR.

AND

STUART E. GOLDBERG
of the law firm of
Ervin, Varn, Jacobs,
Odom & Kitchen
Post Office Drawer 1170
Tallahassee, FL 32302
(904)224-9135

ATTORNEYS FOR APPELLANTS
FIRST UNION NATIONAL BANK
OF FLORIDA AND FIRST UNION
CORPORATION OF FLORIDA

APPENDIX TO
JURISDICTIONAL STATEMENT

TABLE OF CONTENTS

	PAGE(S)
Opinion of the Supreme Court of Florida rendered September 24, 1987 [513 So.2d 114 (Fla. 1987)]	1-22
Opinion of the District Court of Appeal, First District, State of Florida, rendered February 5, 1987 [502 So.2d 964 (Fla. 1st DCA 1987)]	23-30
Final Summary Judgment of the Circuit Court of the Second Judicial Circuit of Florida rendered December 16, 1985	31-40
Appellants' Notice of Appeal to the Supreme Court of the United States dated December 18, 1987	41-43

SUPREME COURT OF FLORIDA

No. 70,186

DEPARTMENT OF REVENUE, etc., et al., Appellants,

vs.

FIRST UNION NATIONAL BANK OF FLORIDA, etc., et al., Appellees.

[September 24, 1987]

GRIMES, J.

This is an appeal from a decision of the First District Court of Appeal declaring invalid a portion of part VII, chapter 220, Florida Statutes (1985). First Union National Bank v. Florida Department of Revenue, 502 So.2d 964 (Fla. 1st DCA 1987). Under the mandatory jurisdiction of article V, section 3(b)(1), Florida Constitution, we uphold the statute.

Appellees (banks) filed suit challenging the validity of the franchise tax imposed on banks and savings associations by section 220.63, Florida Statutes (1985), on the ground that it violated the Federal Public Debt Statute, 31 U.S.C. § 3124 (1982). The trial court upheld the statute and entered summary judgment against the banks. The First District Court of Appeal reversed and held the taxing statute invalid to the extent that it purported "to include federal instrumentalities in its measure."

Section 220.63, Florida Statutes (1985), states in pertinent part:

> (1) A franchise tax measured by net income is hereby imposed on every bank and savings association for each taxable year commencing on or after January 1, 1973, and for each taxable year which begins before and ends after January 1, 1973. The franchise tax base of any bank for a taxable year which begins before and ends after January 1, 1972, shall be prorated

> in the manner prescribed for the proration of net income under s. 220.12(2).
>
> (2) The tax imposed by this section shall be an amount equal to 5 1/2 percent of the franchise tax base of the bank or savings association for the taxable year. . . .
>
> (3) For purposes of this part, the franchise tax base shall be adjusted federal income, as defined in s. 220.13, apportioned to this state, plus nonbusiness income allocated to this state pursuant to s. 220.16, less the deduction allowed in subsection (5) and less $5,000.

The banks, which derive substantial monies from federal obligations, argued that the tax was prohibited under 31 U.S.C. § 3124(a), which reads:

> Exemption from taxation
> (a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except--

(1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and

(2) an estate or inheritance tax.

The district court pointed out that the tax was measured by the adjusted federal income for the current tax year and imposed at the same rate as taxes are levied upon other corporations for the privilege of doing business in Florida. The court concluded that section 220.63 was the equivalent of an income tax and thereby invalid to the extent that it purported to include income from federal securities within its measure. However, the question is not whether the tax operates in a manner similar to an income tax. Rather, the question is whether the tax is a nondiscriminatory franchise tax as contemplated by the exception contained in 31 U.S.C. § 3124. An analysis of

the treatment of that statute by the United States Supreme Court is essential to our determination.

Prior to 1959, the federal statute exempting United States obligations from taxing by the state simply read:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

31 U.S.C. § 742. The United States Supreme Court interpreted this language to prohibit state taxes imposed on federal obligations, either directly or indirectly, as part of a tax on the taxpayer's total property or assets. New Jersey Realty Title Insurance Co. v. Division of Tax Appeals, 338 U.S. 665, 70 S.Ct. 413, 94 L.Ed. 439 (1950). However, that Court also consistently held that the statute did not prohibit nondiscriminatory taxes imposed on discreet property interests

such as corporate shares or business franchises, even though the value of that interest was measured by the underlying assets, which included federal obligations. Werner Machine Co. v. Director of Taxation, 350 U.S. 492, 76 S.Ct. 534, 100 L.Ed. 634 (1956); Des Moines National Bank v. Fairweather, 263 U.S. 103, 44 S.Ct. 23, 68 L.Ed. 191 (1923). In Society for Savings v. Bowers, 349 U.S. 143, 75 S.Ct. 607, 99 L.Ed. 950 (1955), the Court acknowledged that this formal but economically meaningless distinction between taxes on government obligations and taxes on separate interests was "firmly embedded in the law."

In American Bank & Trust Co. v. Dallas County, 463 U.S. 855, 103 S.Ct. 3369, 77 L.Ed.2d 1072 (1983), the United States Supreme Court considered the validity of a Texas property tax on bank shares under the new law. The value of United

States obligations held by the banks was included in the determination of the value of the bank shares. Admitting that the tax would have been sustained under the old statute, the Court observed that under the language of the 1959 amendment, the tax was invalid because federal obligations were at least indirectly considered in computing the tax. Apropos to the instant case, however, the Court made the following observations:

> The express exceptions to the 1959 amendment--franchise taxes and estate and inheritance taxes--reinforce this conclusion. Just as state tax laws relating to corporate or bank shares generally assess the shares according to the value of the corporation's assets, see Society for Savings v. Bowers, 349 U.S., at 148, 75 S.Ct., at 610, franchise and estate and inheritance taxes customarily assess the franchise or the demise at the value of the assets of the business or at the value of the property inherited. See, e.g., Werner Machine Co. v. Director of Taxation, 350 U.S., at 492, 76 S.Ct.,

at 534 (franchise tax measured by "net worth"); Plummer v. Coler, 178 U.S., at 134, 20 S.Ct., at 836 (inheritance tax measured by "the value of the property passing"); Home Ins. Co. v. New York, 134 U.S., at 599, 10 S.Ct., at 595 (franchise tax measured by "capital stock and dividends").

Prior to the 1959 amendment, franchise and estate and inheritance taxes measured by the value of federal obligations, like bank shares taxes, were upheld on the theory that the tax was levied on the franchise or the transfer of property, rather than on the ownership interest in the federal securities themselves. By expressly exempting franchise and estate and inheritance taxes from the amended § 3701, Congress manifested its awareness that the new language would broaden significantly the prohibition as it had been construed by the courts. Congress must have believed that franchise and estate and inheritance taxes required federal obligations to "be considered, directly or indirectly, in the computation of the tax"; otherwise, the specific exemptions for these taxes would have been superfluous. there is no reason to conclude that shares taxes are any different.

. . . .

> From the specific exceptions for franchise and estate and inheritance taxes, and the conspicuous omission of shares taxes from that group, only one inference is possible: Congress meant to bar shares taxes to the extent they consider federal obligations in the computation of the tax. Cf. Andrus v. Glover Construction Co., 446 U.S. 608, 616, 100 S.Ct. 1905, 1910, 64 L.Ed.2d 548 (1980); Andrus v. Allard, 444 U.S. 51, 56, 100 S.Ct. 318, 322, 62 L.Ed.2d 210 (1979).

463 U.S. at 863-64 (footnote omitted). Thus, it is evident that the Supreme Court recognized that a nondiscriminatory franchise tax is excepted from the exemption from taxation provided by 31 U.S.C. § 3124 even though it is measured by the value of federal obligations or the income therefrom.

In Garfield Trust Co. v. Director, Division of Taxation, 102 N.J. 420, 508 A.2d 1104 (1986), the New Jersey Supreme Court considered the same issue that is now before us. The state imposed

a franchise tax computed by adding together prescribed percentages of a new worth base and a new income base. The net worth base included the face value of federal obligations, and the net income base included income on federal obligations. In upholding the validity of the tax, the court said:

> In sum, we conclude that the CBT always has been and still is an annual franchise tax. The holding and implications of Werner Machine retain their vitality through recent decisions of both this Court and the United States Supreme Court. See American Bank and Trust Co. v. Dallas, 463 U.S. 855, 103 S.Ct. 3369, 77 L.Ed.2d 1072 (1983); Memphis Bank & Trust Co. v. Garner, 459 U.S. 392, 103 S.Ct. 692, 74 L.Ed.2d 562 (1983). Therefore, inclusion of the face value and interest income of federal obligations in the bases for calculating the CBT does not by its own force violate the Federal Public debt Statute.

102 N.J. at 428, 508 A.2d at 1109. The court also rejected the contention that

the measuring of the tax with reference to the net income base transformed it from a franchise tax to an income tax when it observed:

> This argument ignores the fact that the United States Supreme Court noted in Werner Machine: "This Court has consistently upheld franchise taxes measured by the yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property." 350 U.S. at 494, 76 S.Ct. at 535, 100 L.Ed. at 637 (citations omitted) (emphasis added).

102 N.J. at 427, 508 A.2d at 1108.

Any doubt that the New Jersey court had misconstrued 31 U.S.C. § 3124 was laid at rest when an appeal from that decision was dismissed by the United States Supreme Court for "want of a substantial federal question." Garfield Trust Co. v. Director, Division of Taxation, ____U.S.____, 107 S.Ct. 390, 93 L.Ed.2d 345 (1986). This was an appeal which

invoked the obligatory jurisdiction of the Court in contrast to the discretionary jurisdiction it exercises with respect to certiorari cases. An appeal to the United States Supreme Court that is dismissed for want of a substantial federal question constitutes an adjudication on the merits. Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

In an earlier decision, the Minnesota Supreme Court upheld a corporate franchise tax measured by the net income for the taxable year for which the tax was imposed even though interest on federal securities was includible in the net income. Reuben L. Anderson-Cherne, Inc. v. Commissioner of Taxation, 303 Minn. 124, 226 N.W.2d 611 (1975). As in the Garfield Trust case, the United States Supreme Court dismissed an appeal from that decision for want of a substantial federal question.

Reuben L. Anderson-Cherne v. Commissioner of Revenue of Minnesota, 423 U.S. 886, 96 S.Ct. 181, 46 L.Ed.2d 118 (1975). A Montana franchise tax, similar to the Florida tax except for the fact that the franchise base was determined from the preceding year's income, has also been upheld against the contention that it was in violation of the Federal Public Debt statute. Schwinden v. Burlington Northern, Inc., 691 P.2d 1351 (Mont. 1984), clarified, 730 P.2d 442 (Mont. 1986).

Consistent with the legislative findings and declaration of intent contained in chapter 72-272, Laws of Florida, section 220.63 is a classic nonproperty excise tax on the privilege of operating a bank or savings association within the state. As such, it is a franchise tax as contemplated by the exception numbered (a)(1) of 31 U.S.C. § 3124. Contrary to the suggestion

of the banks, our holding does not mean that we would sustain a franchise tax on a personal business measured by its net income in the face of a challenge grounded upon Florida's constitutional proscription against a personal income tax.

There remains an additional question that must be answered which was not reached by the First District Court of Appeal because of its disposition of the case. section 220.63 only falls within the exception contained in 31 U.S.C. § 3124 if it is a "nondiscriminatory" franchise tax. In Memphis Bank & Trust Co. v. Garner, 459 U.S. 392, 103 S.Ct. 692, 74 L.Ed.2d 562 (1983), the United States Supreme Court defined the term "nondiscriminatory" in the context of 31 U.S.C. § 3124 as follows:

> A state tax that imposes a greater burden on holders

> of federal property than on holders of similar state property impermissibly discriminates against federal obligations. See e.g. United States v. County of Fresno, supra, 429 U.S., at 462, 97 S.Ct., at 704 ("a state tax imposed on those who deal with the Federal Government" is unconstitutional if the tax "is imposed [un]equally on . . . similarly situated constituents of the State"). Our cases establish, however, that if the "tax remains the same whatever the character of the [property] may be, no claim can be sustained that this taxing statute discriminates against the federal obligations."

459 U.S. at 397-98 (emphasis supplied). The Court held the Tennessee bank tax invalid in that case because it included within its tax base income from federal obligations but excluded income from otherwise comparable state and local obligations.

Florida's tax mandates the inclusion of all interest earned on federal, state and local debt obligations in the tax base for purposes of measuring the tax.

Federal obligations are included in the tax base by section 220.63(3), which adopts the definition of "adjusted federal income" codified in section 220.13, Florida Statutes (1985). State and local obligations are included in the tax base by section 220.13(1)(a)2, Florida Statutes (1985), which requires the addition or inclusion of all interest which is "excluded from taxable income under s. 103(a) of the Internal Revenue Code." Section 103(a) of the Internal Revenue Code excludes interest on the obligations of the state or political subdivision thereof. Thus, there is a parity of treatment for all federal, state and local debt obligations.

Consistent with the statutory purpose, rule 12C-1.013(1)(a)2., Florida Administrative Code, provides as follows:

> Pursuant to legislation enacted during the 1972 regular session of the legislature and retroactive to January 1, 1972, taxable

> income as defined in Code Section 220.13(2) shall be adjusted under Code section 220.13(1)(a)2. by adding thereto all interest which is excluded from federal taxable income. This addition shall include interest income excluded under section 103(a) of the Internal Revenue Code, principally interest from state and local debt obligations, and interest income derived from other obligations which are exempt from federal income tax by federal law, by state law or by the terms of their issue.

By affidavit, the assistant director of the Division of Audits attested that since inception of the franchise tax on banks, the Department of Revenue has consistently maintained the policy that interest income from debt obligations issued by the federal government or by any state or local authority is subject to inclusion in the franchise tax base. Though not controlling, the administrative construction of a statute by those charged with its enforcement and interpretation

is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. Gay v. Canada Dry Bottling Co., 59 So.2d 788 (Fla. 1952); Boca Raton Publishing Co. v. Department of Revenue, 413 So.2d 106 (Fla. 1st DCA 1982). In granting tax exemptions for certain state and local debt obligations, the legislature often includes savings language which states that the exemption "shall not be applicable to any tax imposed by chapter 220 on interest, income, or profits on debt obligations owed by corporations." We believe this terminology is sufficiently broad to encompass the taxes imposed by part VII of chapter 220. To hold otherwise would be contrary to the legislative intent that the franchise tax should not discriminate in favor of state and local obligations. See National Bank

of Alaska v. State, Department of Revenue, 642 P.2d 811 (Alaska 1982); Connecticut Bank & Trust Co. v. Tax Commissioner, 178 Conn. 243, 423 A.2d 883 (1979). Significantly, the legislature employed essentially the same language in a repealer provision contained in the very law which created the franchise tax, to wit:

> Sections 125.019, 159.15, 159.31, 159.50, 183.14, 215.76, 243.33, 315.11, 340.20, 348.122, 348.65, 348.762, 349.13, 403.1834, 423.03 and 554.102, Florida Statutes, and all other comparable statutes of tax exemption, are hereby repealed to the extent that they would exempt interest, income or profits on debt obligations from the tax imposed by chapter 220, Florida Statutes.

Ch. 72-278, § 10, Laws of Fla.

The banks are able to point to only two statutes which purport to favor state and local debt obligations that do not contain the traditional savings clause and which were not specifically repealed

by section 10 of chapter 72-278. One of these is section 153.76, Florida Statutes (1985), which provides for the favorable treatment of state and local debt obligations in connection with the issuance of water and sewer bonds authorized by sections 153.62 and 153.63, Florida Statutes (1985). However, because section 153.76 was enacted in 1959, it was rendered inapplicable to the franchise tax by the 1972 repeal of "other comparable statutes of tax exemption . . . that . . . would exempt interest, income or profits on debt obligations from the tax imposed by chapter 220, Florida Statutes." Ch. 72-278, § 10, Laws of Fla.

The other statute relied on by the banks is section 348.91, Florida Statutes (1985), which purports to exempt Pasco County Expressway bonds from state taxation. This law was not passed until after section

10 of chapter 72-278, Laws of Florida. However, it is undisputed that no bonds have ever been issued pursuant to this statute. If they were, section 348.84, Florida Statutes (1985), requires that they would have to be issued under the authority of the State Bond Act which contains the selfsame language that the exemption from state and local taxation is not applicable "to any tax imposed by chapter 220 on interest, income, or profits on debt obligations owed by corporations." § 215.76, Fla. Stat. (1985). Therefore, we need not decide whether section 10 of chapter 72-278, Laws of Florida, was sufficient to negate the exemption later provided in section 348.91.

We hold that the Florida franchise tax on banks and savings associations is nondiscriminatory and, therefore, qualifies as an exception to the exemption

as set forth in 31 U.S.C. § 3124. We reverse the decision of the First District Court of Appeal and direct that the summary judgment for appellants be reinstated.

It is so ordered.

McDONALD, C.J., and OVERTON, SHAW, BARKETT and KOGAN, JJ., Concur NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the District Court of Appeal - Statutory or Constitutional Invalidity

First District - Case No. BK-432

Robert A. Butterworth, Attorney General, and Linda Lettera, Assistant Attorney General, Tallahassee, Florida,

for Appellants

Joseph C. Jacobs, Thomas M. Ervin, Jr. and Stuart E. Goldberg of Ervin, Varn, Jacobs, Odom & Kitchen, Tallahassee, Florida,

for Appellees

Robert J. Winicki of Mahoney, Adams, Milam, Surface & Grimsley, Jacksonville, Florida,

for Barnett Banks of Florida, Inc., Amicus Curiae

IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

FIRST UNION NATIONAL BANK, a national bank, and FIRST UNION CORPORATION OF FLORIDA, a bank holding company,	)	CASE NO. BK-432
Appellants,	)	
vs.	)	
FLORIDA DEPARTMENT OF REVENUE, an agency of the State of Florida, and GERALD D. (SIC) LEWIS, Comptroller of the State of Florida,	)	
Appellees.	)	

Opinion filed February 5, 1987.

An Appeal from the Circuit Court for Leon County.
Charles E. Miner, Jr., Judge.

* * * *

BOOTH, C.J.

This cause is before us on appeal from a summary judgment entered in favor of appellees upholding the validity of Section

220.63, Florida Statutes,[1] on the grounds that the tax thereby imposed on banks is a nondiscriminatory franchise tax for the privilege of doing corporate business in the state.[2] Section 220.63, Florida Statutes, is in pertinent part as follows:

> (1) A franchise tax measured by net income is hereby imposed on every bank and savings association of each taxable year commencing on or after January 1, 1973, and for each taxable year which begins before or ends after January 1, 1973. The franchise tax base of any bank for a taxable year which begins before and ends after January 1, 1972, shall be prorated in the manner prescribed for the proration of net income under s. 220.12(2).
>
> (2) The tax imposed by this section shall be an amount equal to 5 1/2 percent of the

---

[1]Section 220.63(2), Florida Statutes (1979), imposed a five percent tax which was increased to five and one-half percent applicable to years beginning on or after September 1, 1984.

[2]At issue are taxes paid under protest for the years 1981, 1982, 1983, 1984, and 1985.

> franchise tax base of the bank or savings association for the taxable year....
>
> (3) For purposes of this part, the franchise tax base shall be adjusted federal income, as defined in s. 220.13, apportioned to this state, plus nonbusiness income allocated to this state pursuant to s. 220.16, less the deduction allowed in subsection (5) and less $5,000.

Appellants contend the purported franchise tax is substantively indistinguishable from the Florida corporate income tax and, as such, is invalid to the extent it conflicts with the Federal Public Debt Statute, Title 31, section 3124, United States Code, by including interest earned on United States Stocks and obligations in its tax base.

The United States Code, Title 31, Section 3124, provides in pertinent part:

> Exemption from taxation
>
> (a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision

> of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except--
>
> (1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and
>
> (2) an estate or inheritance tax. [emphasis added]

Appellants claim that the tax levied upon banks by Section 220.63 does not fall within the above-quoted exception of Title 31, Section 3124(a)(1), United States Code, since the Florida bank "franchise" tax is nothing more than a mislabeled income tax.[3]

---

[3]This is appellants' first issue. Appellants' second contention is that the tax discriminates against federal instrumentalities in favor of state instrumentalities because of exemption allowed to state instrumentalities. Due to our disposition of the first issue, it is unnecessary to address the second.

The United States Supreme Court has upheld state taxes levied upon a corporate franchise even though a part of the economic impact of such a tax may be said to bear indirectly upon income derived from instrumentalities of the federal government. Werner Machine Company, Inc. v. Director, Division of Taxation, Department of Treasury, State of New Jersey, 350 U.S. 492, 76 S.Ct. 534, 100 L.Ed. 634 (1956). However, if judicial inquiry discloses that the purpose of state legislation is to accomplish indirectly what cannot be accomplished directly, namely, the taxation of federal instrumentalities, then the tax must be stricken. This is true regardless of the name ascribed to the tax by statute. Macallen Company v. Commonwealth of Massachusetts, 279 U.S. 620, 625, 49 S.Ct. 432, 434, 73 L.Ed. 874, 879 (1929); Owens v. Fosdick, 153 Fla. 17, 20, 13 So. 2d

700, 703 (Fla. 1943). Judicial inquiry into the nature of a tax should focus on the operation and practical effect of the tax in question. Educational Films Corporation v. Ward, 282 U.S. 379, 51 S.Ct. 170, 75 L.Ed. 400 (1931).

Applying these basic principles to the case before us, we can find no basis for holding the tax is other than an income tax. On the contrary, the tax imposed by Section 220.63 operates in the same manner as the Florida corporate income tax. Both taxes are measured by adjusted federal income for the current tax year;[4] the rates imposed by each are identical, and both taxes are levied

---

[4]The United States Supreme Court distinguished and upheld franchise taxes measured by the preceding year's corporate income in Bass, Ratcliff & Gretton v. State Tax Commission, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282 (1924), and Educational Films Corporation v. Ward, 282 U.S. 379, 51 S.Ct. 170, 75 L.Ed. 400 (1931).

upon corporations for the privilege of doing business in the state. The only cognizable difference between the two taxes are the statutory labels, and even that is belied by Section 220.63 being made part of the "Florida Income Tax Code." Finally, we note that the tax imposed by Section 220.68 is expressly in lieu of income tax imposed on other corporations.[5] §220.65, Fla. Stat.

We hold, therefore, that the tax imposed by Part VII, Chapter 220, Florida Statutes, is an income tax for purposes of Title 31, Section 3124, United States Code, and invalid to the extent it purports to include federal instrumentalities in its measure.

Accordingly, we reverse and remand to the trial court for further proceedings

---

[5] See People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48, 57, 129 N.E. 202, 205 (N.Y. 1920).

to determine the refund to which appellants are entitled.

JOANOS and ZEHMER, JJ., CONCUR.

IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY,
FLORIDA

ATLANTIC NATIONAL BANK
OF FLORIDA, a national
bank, and ATLANTIC
BANCORPORATION, a bank
holding company,

Plaintiffs, CASE NO. 84-2654

FLORIDA DEPARTMENT OF
REVENUE, & GERALD A.
LEWIS, Comptroller of
the State of Florida,

Defendants.

FINAL SUMMARY JUDGMENT

THIS CAUSE came on for hearing upon Plaintiffs' Motion for Partial Summary Judgment Based Upon Patent Invalidity of Tax. Plaintiffs and Defendants agree that the only material issues of fact remaining to be resolved deal with the amount of refunds, if any, and the timeliness of one of the refund applications. However, Plaintiffs and Defendants also agree that if the validity of the tax is upheld,

the amount and timeliness of any refunds is immaterial and there remains only issues of law.

Having heard oral argument of counsel in addition to reviewing the memoranda of law submitted, the Court finds that the motion should be denied and concludes as follows:

1. Plaintiffs challenge the validity of the franchise tax on banks and savings associations imposed pursuant to Part VII, Ch. 220, Fla. Stat., on the ground that it violates the Federal Public Debt Statute, 31 U.S.C. §3124, which provides in pertinent part, as follows:

> Exemption from taxation
> (a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except --

(1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and

(2) an estate or inheritance tax. (e.g.)

Pursuant to the federal statute, states are prohibited from taxing interest derived from stocks and obligations of the United States Government. However, the exemption from state and local taxation is not without exception. States may impose "a nondiscriminatory franchise tax or another non-property tax instead of a franchise tax" on a corporation and may consider and include the federal obligation, the interest earned on the obligation, or both, in the computation of such a tax.

2. This Court finds that the tax at issue does not violate 31 U.S.C. §3124 because it falls squarely into the exception contained in subsection (a)(1) of §3124.

The tax constitutes a nondiscriminatory franchise tax or nonproperty tax imposed on a corporation and interest earned on U.S. obligations may be considered in computing the tax.

3. The tax imposed by Part VII, Ch. 220, Fla. Stat., is a classic franchise tax, i.e., an excise or privilege tax imposed on a corporation or artifical (sic) entity for the privilege of doing business in corporate or artifical (sic) capacity in the state. It is imposed on banks and savings institutions for the privilege of conducting business, deriving income, or existing within the state. In addition, the legislative intent to enact an excise or privilege tax is abundantly clear. Sections 220.64 and 220.02, Fla. Stat. See also, §8, Ch. 72-278, Laws of Florida.

4. In finding the tax to be a franchise or excise tax, the Court rejects Plaintiffs'

argument that the tax is a tax on income derived from U.S. obligations. There is a long recognized distinction between a tax laid directly on income from governmental instrumentalities and an excise tax imposed upon corporate franchises for the privilege of doing business in a state even though the corporate income which is the measure of the tax embraces tax exempt securities or their income. See, Werner Machine Co. v. Director of Taxation, 350 U.S. 492, 76 S.Ct. 534, 100 L.Ed. 634 (1956); Educational Films Corp. v. Ward, 282 U.S. 379, 51 S.Ct. 170, 75 L.Ed. 400 (1931). Other state courts have also rejected this argument in upholding taxes similar to the Florida tax in question. See, for example, Schwinden v. Burlington Northern, 691 P.2d 1351 (Mont. 1984); Garfield Trust Company v. Director, Div. of Taxation, 6 N.J. Tax 462 (1984), aff'd,

Superior Ct. of N.J., Case No. A-5620-83T7 (1985); National Bank of Alaska v. State Dept. of Revenue, 642 P.2d 811 (Alaska 1982); Connecticut Bank & Trust Co. v. Tax Com'r., 423 A.2d 883 (Conn. 1979); Reuben L. Anderson - Cherne v. Com'r of Taxation, 226 N.W.2d 611 (Minn. 1975) appealed dism'd, 423 U.S. 886 (1975).

5. A second issue raised by Plaintiffs' attack under 31 U.S.C. §3124 is whether the tax is nondiscriminatory. In Memphis Bank & Trust Co. v. Garner, 459 U.S. 392, 103 S.Ct. 692, 74 L.Ed.2d 562 (1983), the Supreme Court defined the term "nondiscriminatory" in the context of 31 U.S.C. §3124 to pertain to the treatment for tax purposes of federal obligations as compared with state obligations. The Tennessee tax under consideration discriminated against federal obligations by including in the tax base income from federal obligations

while excluding income from comparable state and local obligations. The Florida tax does not discriminate. It treats federal, state, and local obligations equally. All interest earned from federal, state and local debt obligations must be included in the tax base for computation of the tax. By its express terms the tax mandates inclusion in the franchise tax base of interest earned from federal obligations and interest earned from state and local obligations. See, §§220.63 and 220.13(1)(a)2, Fla. Stat. In addition, contemporaneous with the passage of the tax, the Legislature repealed all statutes of tax exemption for state and local debt obligations to the extent they would exempt interest, income, or profits on debt obligations from any tax imposed by Ch. 220, Fla. Stat. See §10, Ch. 72-278, Laws of Florida. Language routinely

employed by the Legislature in granting exemption from taxation for state and local debt obligations specifically states that the exemption "shall not be applicable to any tax imposed by Ch. 220." The tax on banks and savings associations imposed by Part VII, Ch. 220 is inescapably a tax imposed by Ch. 220 and thus the exemption does not apply. Interest earned on all state and local debt obligations must be included in the tax base. The Florida tax is nondiscriminatory and does not violate 31 U.S.C. §3124.

It is, thereupon, ORDERED and ADJUDGED that:

1. Plaintiffs' Motion for Partial Summary Judgment upon Patent Invalidity of Tax is hereby denied.

2. The franchise tax on banks and savings institutions imposed pursuant to Part VII, Ch. 220, Fla. Stat., falls

squarely within the purview of the exception to the exemption contained in the Federal Public Debt Statute, 31 U.S.C. §3124. Accordingly, the State of Florida may include in the franchise tax base, for purposes of measuring the tax, interest earned on federal debt obligations as well as interest earned on all state and local debt obligations. Therefore the tax is valid.

3. By the denial of Plaintiffs' Motion for Partial Summary Judgment, this Court has upheld the validity of the tax and, since the amount of any refunds or the timeliness of any refund application has now become immaterial, there are no issues of material fact. The judicial labors of this Court are over and the Court finds this a circumstance in which in the interest of judicial efficiency Final Summary Judgment should be and

is hereby entered in favor of the Defendants.

DONE and ORDERED, in Chambers at the Leon County Courthouse, Tallahassee, Florida, this 16th day of December, 1985.

/s/ Charles E. Miner, Jr.
CHARLES E. MINER, JR.
CIRCUIT JUDGE

Copies furnished to
all Counsel of Record

IN THE SUPREME COURT OF FLORIDA

FIRST UNION NATIONAL BANK
OF FLORIDA, a national bank,
and FIRST UNION CORPORATION
OF FLORIDA, a bank holding
company,

Appellants,

vs. CASE NO. 70,186

FLORIDA DEPARTMENT OF REVENUE,
an agency of the State of
Florida, and GERALD LEWIS,
Comptroller of the State of
Florida,

Appellees.
_____/

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that First Union National Bank of Florida and First Union Corporation of Florida, appellants above named, hereby appeal to the Supreme Court of the United States from the final decision of the Supreme Court of Florida entered on September 24, 1987, and upholding Part VII, Chapter 220, Florida Statutes

(Bank "Franchise" Tax) upon challenge as a discriminatory income tax on obligations of the United States Government proscribed by the Federal Public Debt Statute, 31 U.S.C. §3124.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Joseph C. Jacobs
JOSEPH C. JACOBS

/s/ Thomas M. Ervin, Jr.
THOMAS M. ERVIN, JR.

and

/s/ Stuart E. Goldberg
STUART E. GOLDBERG
of the law firm of
Ervin, Varn, Jacobs,
Odom & Kitchen
P. O. Drawer 1170
Tallahassee, FL 32302
(904)224-9135

ATTORNEYS FOR APPELLANTS
FIRST UNION NATIONAL BANK
OF FLORIDA and FIRST UNION
CORPORATION OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail this 18th day of December, 1987, to HONORABLE ROBERT BUTTERWORTH, Attorney General, and MS. LINDA LETTERA, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32301, and ROBERT J. WINICKI, ESQ., Mahoney, Adams, Milam, Surface & Grimsley, Post Office Box 4099, Jacksonville, FL 32201.

/s/ Thomas M. Ervin, Jr.
ATTORNEY